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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LEROY REINHOLTZ,

Defendant and Appellant.

D060550

(Super. Ct. No. SCE301340)

APPEAL from a judgment of the Superior Court of San Diego County, Lantz Lewis, Judge. Affirmed in part; reversed in part with instructions.

Leroy Reinholtz contends the trial court abused its discretion when it revoked his probation after he was terminated from a sex offender counseling program he was required to complete as a condition of probation. Conversely, Reinholtz contends he received ineffective assistance of counsel during the probation revocation hearing because defense counsel failed to object to his probation officer's hearsay testimony

regarding information provided by employees of the counseling program, which testimony Reinholtz contends is the only evidence of his alleged probation violation.

Finally, Reinholtz contends that the trial court erred when it required him to submit to AIDS/HIV testing and that the abstract of judgment should be modified to correct a clerical error.

As we explain, we agree there is insufficient evidence in this record to support the order requiring Reinholtz to submit to AIDS/HIV testing and agree the abstract of judgment should be corrected. In all other respects, we reject Reinholtz's contentions and affirm the judgment of the trial court.

#### FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

Reinholtz was charged with two counts of committing a lewd act on a child under the age of 14 (Pen. Code,<sup>2</sup> § 288, subd. (a), counts 1 & 4); one count of a forcible lewd act on a child under the age of 14 (*id.*, subd. (b), count 2); and one count of attempted oral copulation with a child under the age of 14 (§ 288a, subd. (c)(1), count 3). Reinholtz subsequently pleaded guilty to counts 1 and 4.

The factual basis for Reinholtz's guilty plea reads as follows:

"[O]n March 21st of this year [e.g., 2010], you touched the buttocks, over the clothes, of a child under the age of 14 years old. And on and between the dates of January 1, 2008, and March 21, 2010, you again touched the buttocks over the clothing of

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<sup>1</sup> Certain portions of the factual and procedural history related to Reinholtz's contentions are discussed *post*.

<sup>2</sup> All statutory references are to the Penal Code unless otherwise noted.

the same child, the child under 14 years of age, and that . . . in the commission of those acts, you did the touching with the intent to appeal to the lusts, passions, and sexual desires of yourself and the child."

The record shows that during his guilty plea Reinholtz at first was reluctant to admit these facts, but after conferring with defense counsel he ultimately pleaded guilty to counts 1 and 4, as noted *ante*.

The probation officer's report noted that at the time of the offenses, Reinholtz was renting a room from the victim's uncle; that his victim, then a seven-year-old girl named D.B., was living with her aunt and uncle and that on the date of the offense D.B.'s uncle went to the store and left D.B. alone with Reinholtz.

The report states D.B. asked Reinholtz to take her to a fast food restaurant for something to eat. Instead, according to D.B., Reinholtz closed the blinds in his room and exposed his penis to D.B., which she referred to as a " 'ding dong.' " Reinholtz next tried to pull D.B. on top of him. When she resisted, Reinholtz pushed her down on the bed and got on top of her. D.B. used her feet to push Reinholtz away, punched him in the stomach and ran to a neighbor's house where she reported the incident. When interviewed, D.B. reported this was the second such incident involving Reinholtz, and a similar incident had also occurred in his bedroom when he told D.B. she " 'could play with his ding dong and suck on it.' "

D.B. reported that none of her clothes had come off during the most recent incident and that Reinholtz's penis was back inside his pants when he tried to get on top of her. However, D.B. also reported that Reinholtz tried to pull down her pants but she

smacked his hands, and then touched over her clothes her buttocks and told her she had a " 'nice butt.' "

The probation report notes that when D.B.'s uncle returned, the neighbor reported what D.B. had told the neighbor, including that Reinholtz was being mean to her, that she wanted help running away and that this was not the first such incident committed by Reinholtz. The neighbor reported D.B. appeared agitated and scared, and had sweat beads on her upper lip. When D.B.'s uncle tried to speak to Reinholtz about what happened, Reinholtz drove away in a car. D.B.'s uncle called police.

Reinholtz was interviewed at the police station. He stated he had been babysitting D.B. for about a year and half and that D.B. had problems in school and was seeing a psychologist. Reinholtz claimed D.B. each night would come into his room because she was afraid of her uncle. He also told detectives that D.B. came into his room without knocking, sometimes when he was naked.

Regarding the incident earlier that day, Reinholtz denied molesting D.B., claimed D.B. had been jumping on his bed and she may have "bounce[d]" on him while they were playing. When asked if D.B. was coming on to him, Reinholtz said: "Yea[h], and I told her [']no I can't do that.['] Very emphatically I told her. [']I can't have sex with you. I don't have sex with little girls.['] " Reinholtz admitted he thought about having sex with D.B. When asked a second time if he was getting excited sexually when the victim climbed on top of him that day, Reinholtz replied: " 'Somewhat, yea[h], but I never penetrated her.' "

During the interview, Reinholtz admitted to being on top of D.B. " 'one time,' " but denied trying to penetrate her. Reinholtz also denied trying to take D.B.'s pants off her and said he touched her waistband in an effort to push her away. However, he later admitted exposing his penis to D.B. and asking her if she ever " 'sucked a penis[' "] because he was curious whether D.B. had been a molestation victim. Reinholtz admitted during the interview he was excited when she was sitting on his lap, but responded he "knew better," he did not "penetrate" D.B. and said he did not "fuck little girls."

When asked about other alleged incidents involving D.B. including whether he had touched D.B.'s buttocks, Reinholtz said, " 'Well, I never ever penetrated her.' " He went on to tell detectives that eventually D.B. would tell him the "truth that she had sex or didn't have sex,' " and estimated he spoke to D.B. about sex " 'at least ten times.' "

At sentencing, the trial court granted Reinholtz probation for a term of five years on the condition he serve 365 days in local custody. In so doing, the court considered the fact Reinholtz was 74 years old at the time he committed the offenses and his lack of any prior criminal record. However, the trial court noted it was concerned by Reinholtz's reluctance to accept responsibility for his conduct and by his attempts to shift blame to D.B. for what happened. The court also noted that it intended to be "extremely cautious under the circumstances in making a grant of probation" in light of the "nature of this offense and the nature of the offender"; and that during subsequent probation review hearings it would "be able to make a determination as to whether Mr. Reinholtz has fully accepted responsibility [for his offenses] and has recognized the error of shifting blame to

a seven-year-old" because one of the conditions of probation required Reinholtz to "engag[e in] and faithfully follow[] through with sex offender treatment."

## DISCUSSION

### I

#### *Parole Revocation*

Reinholtz contends the trial court abused its discretion when it revoked his probation and sentenced him to five years in state prison.

##### *A. Additional Background*

At a review hearing held in April 2011, Reinholtz submitted a copy of a lease showing he was living in senior-only housing, which was a condition of his probation, but that because he was no longer receiving veteran benefits he was unable to pay for sex offender treatment as also required by the terms of his probation. The trial court stayed the payment of various penalties and fees to assist Reinholtz in paying for sex offender treatment and set another review hearing for June 2011.

At the June review hearing, the prosecutor informed the court that according to the probation department, Reinholtz was continuing to deny he committed any offense against D.B. despite his plea otherwise and that his denial was interfering with his treatment. The court ordered a report be prepared for use at the next review hearing regarding Reinholtz's progress in his sex offender treatment program. The court also stayed payment on a restitution fine because it wanted Reinholtz's "primary emphasis to be on paying for [his] counseling."

At a hearing to show cause why probation should not be revoked held in mid-August 2011, the court noted it had received and reviewed a supplemental report from probation alleging that Reinholtz had violated the terms of his probation, specifically paragraph 10(B) of his grant of probation, because Reinholtz had failed to complete sex offender counseling as directed by the court and overseen by his probation officer. The court set the matter for an evidentiary hearing and ordered Reinholtz's probation officer to appear at the upcoming hearing.

Reinholtz's probation officer, Ian St. John, testified at the evidentiary hearing that Reinholtz's performance on probation had been "very poor" since Reinholtz's release from local custody because he "has been unable to complete or get into a sex offender counseling program due to his denial of the instant offense. He initially denied everything of the instant offense, and then when he took an instant offense polygraph and later to me, he admitted some of the facts of the instant offense, but none of the touching. And he was terminated from sex offender treatment" as a result.

St. John testified when he attempted to speak to Reinholtz about completing sex offender treatment, Reinholtz was "very negative and argumentative" and maintained "that he shouldn't be on probation, there's no reason to have these conditions [of probation], and he would bring up his past history as a kind of mitigant to probation conditions."

In discussing Reinholtz's termination from the treatment program, Reinholtz told St. John that if he was guilty of the offenses "there should have been D.N.A. evidence" and "that he shouldn't be on probation to begin with." According to St. John, Reinholtz

also blamed the victim, a seven-year-old girl, for what happened. Reinholtz told St. John the victim was a prostitute and was sexually active.

St. John testified Reinholtz's "opinion was always that he shouldn't be on probation in the first place. He has not done anything wrong. Even when he did admit to exposing himself to her, he referred to it as 'O.J.T.' When I asked him what that meant, he said it was [']on-the-job training.['] He's always had a very negative attitude towards his conditions and being on probation."

St. John also testified Reinholtz was also "negative towards group treatment, has not responded well to the group treatment, . . . and then actually took a break from treatment so that he could take the instant offense polygraph and see if anything would come out of that that would assist in treatment." Reinholtz was given the polygraph at the suggestion of Dr. James Reavis, who oversaw Reinholtz's sex offender treatment, after Reinholtz was in denial about committing the offenses. The results of that test were, according to St. John, "deception indicated."

Reinholtz testified on his own behalf that from "day one" he never got along with Dr. Reavis. Despite that, Reinholtz paid for and attended at least 10 meetings with Dr. Reavis and attended about three group meetings with about 20 other people. Reinholtz also testified if given another chance, he would go to sex offender treatment as required by the terms of his probation.

However, Reinholtz stated during cross-examination that he blamed not only his victim, "but [her] grandmother too" because the grandmother "was the one that dropped [the victim] off at the doorstep and went into prison." Reinholtz admitted that St. John

was "very thorough" in discussing the terms of Reinholtz's probation, and that St. John warned Reinholtz there would be "little tolerance" as far as complying with the treatment requirements.

In ruling to revoke Reinholtz's probation, the court noted as follows:

"Here's the problem I have. I've listened and I have a recollection of what's happened on this long path that has allowed us to reach today's date. I am disappointed we are here today. I remember the first time after Mr. Reinholtz was released, how pleased I was with how he had a sense of time is of the essence to get his place in a senior citizens' facility. He immediately said there was a problem with money because of the veterans [benefits]. I just thought he was taking the bull by the horns.

"But here's what's happening. I do remember on the date of the plea, where there was a plea worked out. And I also remember that it was very difficult at that time, based upon body language, based upon comments that were made both on and off the record, to get Mr. Reinholtz to admit that he committed the felony offenses. Nonetheless, he did. The change of plea form was submitted. I questioned him, and he said, 'Yes, I did it.' But it was like pulling teeth.

"At the time of the interview with the psychologist that prepared the psychological evaluation, there was a denial that he had told the police that he had done anything wrong. There was total blame placed upon the victim. He claimed that he never said the things that the deputy sheriff said. He said there was no sexual excitement whatsoever. It was also a denial to the psychologist that he even used any verbally suggestive words or inappropriate words with the seven-year-old.

"We move from that to the polygraph, where he was found to be evasive when questioned regarding the offense, and I have to say, today, in the way he's testified, he's also been evasive. So this isn't just, 'whoops, I was confronted with something in therapy I wasn't expecting.' This has been the history of the case where Mr. Reinholtz simply is unwilling to accept responsibility for the crimes that he admitted that were committed involving a seven-year-old.

"I'm not inclined, therefore, to conclude there should be another shot at this. It just has gone on too long. This has been over a year now where Mr. Reinholtz, at the appropriate time, has said the right thing. But then when he's really examined regarding it, he's wondering out loud, as the probation officer indicated, 'why do I have to do all of these things? I didn't do anything wrong. It's the victim's fault. It's the grandparents' fault.'

"I don't believe that he has followed through either with the letter or the spirit of the conditions of probation that he participate—that doesn't mean just show up—in sex offender therapy. I don't believe there's any prospect that sex offender therapy, with this frame of mind, would ever be successful, and that is such a crucial element of him being released in the community, that I'm finding this is a serious violation. The evidence does justify a finding that he is violation of probation. And therefore, his probation after evidentiary hearing is revoked."

#### B. *Governing Law*

"Section 1203.2(a) states that a 'court may revoke . . . probation *if the court, in its judgment, has reason to believe* that the [probationer] has violated any of the conditions

of . . . probation . . . or has subsequently committed other offenses . . . .' (Italics added.) It has been long recognized that the Legislature, through this language, intended to give trial courts very broad discretion in determining whether a probationer has violated probation. (See, e.g., *People v. Lippner* (1933) 219 Cal. 395, 400 ['only in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation . . . .']; *People v. Martin* (1943) 58 Cal.App.2d 677, 683–684 ['[N]o particular source, manner or degree of proof is required by statute.'].) [¶] Our decision in *In re Coughlin* [1976] 16 Cal.3d 52, continues to read section 1203.2(a) as conferring great flexibility upon judges making the probation revocation determination." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443.)

"Sentencing choices such as the one at issue here, whether to reinstate probation or sentence a defendant to prison, are reviewed for abuse of discretion. 'A denial or a grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.' [Citation.] A court abuses its discretion 'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 909–910.)

When a trial court, at a probation revocation hearing, is required to resolve evidentiary conflicts, appellate review is based on the substantial evidence test. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848.) Under that test, our review is "limited to the

determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision." (*Ibid.*, fn. omitted.) We "give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision." (*Id.* at pp. 848-849, fns. omitted.)

### C. *Analysis*

Reinholtz contends the record is devoid of evidence showing "what, if anything, [he] willfully did [or did not do] to be terminated from his treatment program." We strongly disagree.

The record clearly shows the trial court carefully considered Reinholtz's well-documented history of refusing to accept responsibility for the serious felony offenses he committed on his seven-year-old victim and of blaming his victim, whom he referred to as a prostitute, and her family, for their commission. The trial court noted this history in revoking Reinholtz's probation, commenting that even at the time the court initially accepted Reinholtz's plea it was like "pulling teeth" to get Reinholtz to admit that he committed the felony offenses.

Moreover, at sentencing when the trial court ultimately granted Reinholtz's request for probation (despite the recommendation of the department of probation that Reinholtz be sentenced to six years in state prison), the court again was concerned by Reinholtz's reluctance to accept responsibility for the offenses and by his attempts to shift blame to D.B. As a result, the court then stated it intended to be "extremely cautious" with Reinholtz and essentially warned him of the need to accept responsibility for his offenses

because one of the conditions of probation required Reinholtz to "engag[e in] and faithfully follow[] through with sex offender treatment," which the record shows did not happen because Reinholtz refused to accept responsibility for what he had done to the victim.

Even after his release from jail after serving local time, Reinholtz continued to deny he did anything wrong. However, after Reinholtz took an instant offense polygraph that came back "deception indicated," Reinholtz admitted some of the facts of the instant offenses but none of the touching (despite his plea).

Further, when Reinholtz spoke to his probation officer about sex offender treatment, his probation officer testified Reinholtz was "very negative and argumentative" about the need for such counseling; Reinholtz continued to maintain there was no reason for him to be on probation; and stated that if in fact he (Reinholtz) was guilty of the offenses, as he previously admitted, "there should have been DNA evidence." Reinholtz also told his probation officer that the victim was a prostitute and was sexually active. What's more, when Reinholtz admitted to exposing his penis to D.B., he referred to his conduct as "O.J.T.," which he said meant "on-the-job training."

Reinholtz was also "negative towards group treatment" and was not responding to that treatment because he denied committing the serious offenses against D.B. For the same reason, Reinholtz also was unable to complete successfully individual treatment, which ultimately led to his taking of the polygraph and finally, when that did not help, his termination from the treatment program.

On this record, in light of such evidence we conclude the trial court properly exercised its broad discretion and did not act in an "arbitrary or capricious manner" (see *People v. Downey, supra*, 82 Cal.App.4th at pp. 909–910) when it revoked Reinholtz's probation and sentenced him to prison for five years, based on its finding that Reinholtz did not, and will likely never be able to, complete successfully sex offender treatment given his mind frame, to wit: that he did not commit the serious offenses against his seven-year-old victim and that the victim (and perhaps her family) was responsible for those offenses. We thus conclude the record contains ample evidence to support the finding Reinholtz willfully failed to complete an important condition of his probation, which more than justified terminating his probation and sentencing him to prison.

That Reinholtz may have had a change in heart after the trial court revoked his probation, and is now willing to admit responsibility for the offenses and meaningfully participate in the sex offender treatment, does not change our conclusion in this case. The record clearly shows that Reinholtz received myriad warnings about the importance of completing sex offender treatment, including from the court and his probation officer, and nonetheless turned a deaf ear to those warnings and continued to maintain his innocence despite his plea agreement. Reinholtz himself admitted that his probation officer was extremely thorough when reviewing the terms and conditions of his probation, including the need to complete successfully sex offender treatment. It is hard to imagine in light of the record before us how one "final" warning would have made any difference to Reinholtz, given his mind frame. In any event, we conclude under the

circumstances the trial court did not abuse its discretion in refusing to give Reinholtz a "final" warning or another opportunity to participate in sex offender treatment.

Given the history of Reinholtz's denials, the seriousness of the offenses and the age of his victim, the number of warnings he in fact received and his own awareness and understanding of the need to participate meaningfully in, and complete successfully, sex offender treatment as a condition of probation, we cannot conclude the trial court acted in an arbitrary and capricious manner when it revoked Reinholtz's probation and sentenced him to five years in prison. (See *People v. Johnson* (1993) 20 Cal.App.4th 106, 110 ["[P]robation is not a matter of right; it is an act of clemency," and when " 'the evidence shows that a defendant has not complied with the terms of probation, the order of probation may be revoked at any time during the probationary period. [Citations.]" ' [Citation.]" ].)<sup>3</sup>

## II

### *Ineffective Assistance of Counsel*

Reinholtz alternatively contends he received ineffective assistance of counsel when defense counsel failed to object to the hearsay statements of his treatment provider, as testified to by his probation officer, and to the statements regarding the results of the polygraph test.

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<sup>3</sup> For the same reasons, we reject Reinholtz's related contention that the trial court abused its discretion and prejudicially erred when it refused to *reinstate* his probation. (See e.g., *People v. Edwards* (1976) 18 Cal.3d 796, 807 [a trial court's decision not to reinstate probation is discretionary, and that decision will not be reversed on appeal absent a showing that the trial court exercised that discretion in an arbitrary and capricious manner].)

### A. Governing Law

A claim of ineffective assistance of trial counsel is subject to a two-prong test. To prevail, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) defendant was prejudiced in that there is a reasonable probability that the result of the trial would have been different absent the alleged deficient representation. (*Strickland v. Washington* (1984) 466 U.S. 668, 684–685 [104 S.Ct. 2052].) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making that evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland v. Washington, supra*, 466 U.S. at p. 689.)

As for the first prong of the *Strickland v. Washington* test, it is axiomatic that "the failure to make objections is a matter of trial tactics which appellate courts will not

second-guess." (*People v. Torres* (1995) 33 Cal.App.4th 37, 48.) "If[, as here,] the record on appeal fails to show why counsel . . . failed to act in the instance[s] asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068–1069.)

Finally, in contrast to a criminal trial, "relaxed rules of evidence govern[ ] probation revocation proceedings." (*People v. Brown* (1989) 215 Cal.App.3d 452, 454; see also *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066-1067 [concluding a one-page hearsay document from defendant's program treatment manager reporting defendant had been terminated from treatment was admissible because that report "was prepared contemporaneously to, and specifically for, the hearing where [defendant's] lack of compliance with the deferred entry of judgment program was at issue" and because that such reports "were routinely received without undertaking the added burden of calling the author to authenticate it because the reports were prepared in response to a referral from the court."].)

#### B. *Analysis*

In the instant case, a satisfactory explanation exists for Reinholtz's counsel's failure to object to the hearsay statements of his treatment provider and the statements regarding the results of the polygraph test. Clearly, if defense counsel had objected on hearsay grounds to these statements, then the prosecutor would have moved to admit the supplemental report into evidence, on which the statements were based. (See *People v. O'Connell*, *supra*, 107 Cal.App.4th at pp. 1066-1067.)

Indeed, the record shows the trial court at the June 2011 probation review hearing ordered the preparation of a supplemental report regarding Reinholtz's progress (or lack thereof) in sex offender treatment. The trial court reviewed and relied on that report at the subsequent probation revocation hearing. Whether through the testimony of Reinholtz's probation officer or through the report specifically prepared for use at that hearing, the information regarding Reinholtz's willful failure to complete successfully sex offender treatment was coming into "evidence." (See *People v. Maki* (1985) 39 Cal.3d 707, 709 [due process requires only a showing of sufficient indicia of the document's reliability for consideration and admission of documentary hearsay evidence at a probation hearing].)

We thus conclude Reinholtz cannot satisfy *either* prong of the *Strickland v. Washington* test, as defense counsel's decision not to object to the hearsay statements at the probation revocation hearing was clearly tactical (see *People v. Torres, supra*, 33 Cal.App.4th at p. 48) given the existence of the supplemental report that was prepared in conjunction with that hearing and, in any event, there is not a reasonable probability that the result of Reinholtz's revocation hearing would have been any different even assuming *arguendo* his counsel was deficient by failing to object on hearsay grounds to statements by his probation officer and from the report. (*Strickland v. Washington, supra*, 466 U.S. at pp. 684–685.) We therefore reject his ineffective assistance of counsel claim.

### III

#### *Remaining Contentions*

##### *A. AIDS/HIV Testing*

Reinholtz next contends there is insufficient evidence to support the trial court's order that he submit to AIDS/HIV testing.

Section 1202.1, subdivision (a) provides "the court shall order every person who is convicted of . . . a sexual offense listed in subdivision (e) . . . to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction. Each person tested under this section shall be informed of the results of the blood or oral mucosal transudate saliva test." "Lewd or lascivious conduct with a child in violation of Section 288" (§ 1202.1, subd. (e)(6)(A)(iii)) is listed as one of the offenses requiring the court order such a test *if* the court "finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." (§ 1202.1, subd. (e)(6)(A).)

An order compelling an AIDS/HIV test pursuant to section 1202.1 may be challenged on appeal for insufficiency of the evidence even absent an objection, because involuntary testing is "strictly limited by statute" and conditioned on a probable cause finding and "[w]ithout evidentiary support the order is invalid." (*People v. Butler* (2003) 31 Cal.4th 1119, 1123.) "Under the substantial evidence rule, a reviewing court will defer to a trial court's factual findings to the extent they are supported in the record, but

must exercise its independent judgment in applying the particular legal standard to the facts as found. [Citations.]" (*Id.* at p. 1127.) "[I]f the trial court orders testing without articulating its reasons on the record, the appellate court will presume an implied finding of probable cause. [Citation.]" (*Ibid.*) "[T]he appellate court can sustain the order only if it finds evidentiary support, which it can do simply from examining the record. "

(*Ibid.*)

Here, the record shows Reinholtz pulled out his penis and exposed himself to D.B. He next attempted to pull down D.B.'s pants and fondle her. At some later point, Reinholtz put his penis back inside his pants and then tried to get on top of D.B. Although Reinholtz touched his penis several times while touching D.B., there is no evidence in the record of the existence of any "bodily fluid capable of transmitting HIV" to D.B. (see §1202.1, subd. (e)(6)(A)), who in any event was fully clothed during the entire incident. (See *People v. Guardado* (1995) 40 Cal.App.4th 757, 765 [rejecting argument that probable cause to support AIDS/HIV testing order can be premised on speculation].) As such, the appropriate remedy is to remand the matter to the trial court to give the prosecution the opportunity to offer evidence, if any exists, to support such an order. (*People v. Butler, supra*, 31 Cal.4th at p. 1129.)

#### B. *Correction of Abstract of Judgment*

Reinholtz contends, and the People concede, that his abstract of judgment should be amended to show that he was convicted of the offenses in 2010, and not in 2011 as it currently provides. The abstract of judgment therefore should be amended accordingly.

## DISPOSITION

The case is remanded to the trial court with directions to (1) permit the prosecution the opportunity to offer evidence to support an AIDS/HIV testing order and (2) prepare an amended abstract of judgment correctly showing that Reinholtz was convicted of the two offenses in 2010 and not in 2011. The trial court shall forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects the order of the trial court is affirmed.

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BENKE, J.

WE CONCUR:

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McCONNELL, P. J.

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HUFFMAN, J.